NAOMI HAIKEY EADES
v.
MUSKOGEE AREA DIRECTOR, BUREAU OF INDIAN AFFAIRS

IBIA 89-57-A Decided July 26, 1989

Appeal from a decision of the Muskogee Area Director, Bureau of Indian Affairs, declining to acquire land in trust status for the benefit of individual Indians.

Vacated and remanded.

1. Board of Indian Appeals: Jurisdiction--Indians: Lands: Trust Acquisitions

The decision whether to acquire land in trust status for an Indian tribe or individual is committed to the discretion of the Bureau of Indian Affairs. In reviewing such a decision, it is not the function of the Board of Indian Appeals to substitute its judgment for that of the Bureau. Rather, it is the Board' s responsibility to ensure that proper consideration was given to all legal prerequisites to the exercise of discretion.

2. Indians: Lands: Trust Acquisitions

Indian tribes and individuals have no legal right under 25 U.S.C. § 409a (1982), 25 U.S.C. § 465 (1982), or 25 U.S.C. § 501 (1982) to have land acquired in trust status for their benefit. Rather, under these statutory provisions, the determination whether to acquire the land is committed to the discretion of the Secretary of the Interior.

3. Indians: Lands: Trust Acquisitions

When the Bureau of Indian Affairs reviews a request to acquire land in trust status for an Indian tribe or individual, it is required to consider the factors listed in 25 CFR 151.10. Proof of the Bureau's consideration of the factors it relies upon to deny a trust acquisition application must appear in the administrative record.

OPINION BY ADMINISTRATIVE JUDGE VOGT

Appellant Naomi Haikey Eades challenges an October 27, 1987, decision of the Muskogee Area Director, Bureau of Indian Affairs (Area Director; BIA), declining to take land in trust for the benefit of appellant and her two daughters. For the reasons discussed below, the Board vacates that decision and remands this case to the Area Director for further proceedings.

Background

Appellant is a Creek Indian of 4/4 degree Indian blood. By letter of June 13, 1984, she and her husband applied to the Okmulgee Agency, BIA, to have taken into trust a parcel of land which they own in fee status. 1/ The land concerned is an 80-acre parcel in Okmulgee County, Oklahoma, described as N½, NE¼, sec. 22, T. 12 N., R. 13 E., Indian Meridian. Appellant and her husband purchased the property in 1983 with funds derived from the sale of property inherited by appellant in restricted fee status. They stated in their trust acquisition application that they intended to use the property for farming and a retirement home, and that they wanted their heirs to have use of it in the future.

The agency obtained an appraisal and an environmental assessment. It also obtained a preliminary title opinion from the Regional Solicitor's Office. That opinion, dated March 12, 1987, noted that, pursuant to a 1963 deed, a 12.38-acre portion of the property was subject to a flowage easement held by the United States. 2/ The Acting Regional Solicitor stated that trust acquisition of the portion of the property subject to the easement might result in a conflict for the United States because of the inconsistent duties of protecting the trust estate and utilizing the flowage easement. He also stated that if the United States were to take legal title to property over which it owns a flowage easement, a merger of title might occur. For these reasons, he recommended excepting the portion of the property subject to the easement from the property to be acquired in trust. He also recommended excepting from the acquisition any portion of the property that was made inaccessible by a river which flowed through the property. 3/ Further, he recommended obtaining an historical survey of the river bed within the tract to determine whether the river had moved over time, thereby enlarging or diminishing the property by accretion or rejection.

1/ Although the application letter does not specify who the prospective beneficial owners were to be, apparently during the course of consideration of the request, it was determined the beneficiaries would be appellant and her two daughters, Linda Jo Eades Coker and Cynthia Anne Eades Caboic.
2/ The title opinion also stated that, in 1964, Okmulgee County had conveyed to the United States the right to flood existing public roads and unopened rights-of-way.
3/ The appraisal of the property stated that an 8-acre portion was made inaccessible by the river.

On April 2, 1987, the agency forwarded the application and related documents to the Area Director, recommending approval of the trust acquisition request. On October 27, 1987, the Area Director denied the request. In his decision letter, he stated that the factors considered included appellant's age, the "very capable manner in which [she] handled her affairs," and the fact that her two daughters were adults. The Area Director concluded that "other means of insuring the protection of your adult children's interest in the property would be more beneficial to them." He also stated that the existence of the flowage easement, and its possible consequences, were other factors taken into consideration.

Appellant appealed the Area Director's decision to the Washington, D.C., office of BIA. In letters dated November 24, 1987, and December 21, 1987, she argued that as a full blood Creek Indian who had inherited her mother's original allotment, she should be given "some benefit or consideration." She stated that other Creeks had purchased property in Tulsa County and had it taken into trust. She therefore argued that she was being discriminated against and felt as if she had to beg for a right to which she was entitled. She also argued that she had been forced to sell her inherited restricted property because it had been surrounded by commercial property and that she had used the proceeds of that sale to purchase the new property. Further, she noted that she believed the matter of the flowage easement could be resolved if she deeded 6 or 7 acres to the United States.

The appeal was pending on March 13, 1989, the date new appeals regulations for BIA and the Board took effect. 4/ It was transmitted to the Board on May 16, 1989, for consideration under the new procedures.

By notice of docketing dated May 19, 1989, the Board gave the parties an opportunity to make any further statement they wished to make. No further statements have been received.

Discussion and Conclusions

[1] The role of the Board in reviewing BIA decisions concerning the acquisition of land in trust status was recently discussed in City of Eagle Butte v. Aberdeen Area Director, 17 IBIA 192, 96 I.D. 328 (1989). In that case, the Board observed that such decisions are committed to BIA's discretion and that the Board does not have jurisdiction to substitute its judgment for BIA's. Cf. State of Florida v. United States Department of the Interior, 768 F.2d 1248 (11th Cir. 1985), cert. denied, 475 U.S. 1011 (1986). The Board concluded in City of Eagle Butte, however, that it does have authority to determine whether BIA gave proper consideration to all legal prerequisites to the exercise of its discretionary authority. 17 IBIA at 195-96, 96 I.D. at 330, and cases cited therein.

4/ See 54 FR 6478 and 6483 (Feb. 10, 1989).

In this case, appellant appears to argue that she is entitled to have land taken into trust for her benefit. Although she does not specifically so state, she may base this argument on her prior ownership of restricted property and the fact that she used the proceeds from the sale of that property to purchase the new property.

25 U.S.C. § 409a (1982) provides:

> Whenever any nontaxable land of a restricted Indian of the Five Civilized Tribes or of any other Indian tribe is sold to any State, county, or municipality for public-improvement purposes, or is acquired, under existing law, by any State, county, or municipality by condemnation or other proceedings for such public purposes, or is sold under existing law to any other person or corporation for other purposes, the money received for said land may, in the discretion and with the approval of the Secretary of the Interior, be reinvested in other lands selected by said Indian, and such land so selected and purchased shall be restricted as to alienation, lease, or incumbrance, and nontaxable in the same quantity and upon the same terms and conditions as the nontaxable lands from which the reinvested funds were derived, and such restrictions shall appear in the conveyance.

[2] While this statutory provision provides authority for the trust acquisition of land purchased with the proceeds of the sale of trust property, it does not require it. Rather, the decision to acquire land in trust status under authority of 25 U.S.C. § 409a (1982) is committed to the discretion of the Secretary of the Interior. Further, the statutory provisions cited by BIA as authority for this proposed acquisition, 25 U.S.C. § 465 (1982) and 25 U.S.C. § 501 (1982), also vest the Secretary with discretion. 5/ Accordingly, the Board holds that appellant does not have a legal right to have property taken into trust for her benefit.

5/ 25 U.S.C. § 465 (19841) provides:

"The Secretary of the Interior is hereby authorized, in his discretion, to acquire * * * any interest in lands * * * for the purpose of providing land for Indians.

* * * * * * *

"Title to any lands or rights acquired pursuant to [the Indian Reorganization Act of 1934, 48 Stat. 984] shall be taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired * * *."

25 U.S.C. § 501 (1982), derived from the Oklahoma Indian Welfare Act of 1936, 49 Stat. 1967, provides:

"The Secretary of the Interior is hereby authorized, in his discretion, to acquire * * * any interest in [certain agricultural and grazing] lands * * * Title to all lands so acquired shall be taken in the name of the United States, in trust for the tribe, band, group, or individual Indian for whose benefit such land is so acquired * * *."

Appellant also argues that she has been discriminated against because other Creeks have had land taken into trust for their benefit. Because no applicant has a right to have land taken into trust for his or her benefit, and because BIA must consider each trust acquisition application on its own merits, an allegation that other Indians have had land taken into trust is insufficient to show that discrimination has occurred. The Board finds that appellant has made no showing that she has been discriminated against.

Under City of Eagle Butte, the Board must consider whether, in denying appellant's application, BIA properly followed the procedures set out in 25 CFR Part 151. 25 CFR 151.10 requires BIA to consider a number of factors in evaluating trust acquisition requests:

> (a) The existence of statutory authority for the acquisition of land in trust status and any limitations contained in such authority;
>
> (b) The need of the individual Indian or the tribe for additional land;
>
> (c) The purposes for which the land will be used;
>
> (d) If the land is to be acquired for an individual Indian, the amount of trust or restricted land already owned by or for that individual and the degree to which he needs assistance in handling his affairs;
>
> (e) If the land to be acquired is in unrestricted fee status, the impact on the State and its political subdivisions resulting from the removal of the land from the tax rolls;
>
> (f) Jurisdictional problems and potential conflicts of land use which may arise; and
>
> (g) If the land to be acquired is in fee status, whether the Bureau of Indian Affairs is equipped to discharge the additional responsibilities resulting from the acquisition of the land in trust status.

[3] With respect to BIA's analysis of these factors, the Board stated in City of Eagle Butte, 17 IBIA at 196-97, 96 I.D. at 331:

> Proof that these factors were considered must appear in the administrative record. Because the final decision on whether or not to acquire land in trust status is committed to BIA's discretion, there is no requirement that BIA reach a particular conclusion as to each factor. See also State of Florida, 768 F.2nd at 1256: "The regulation does not purport to state how the agency should balance these factors in a particular case, or what weight to assign to each factor." In order to avoid any allegation of abuse of discretion, however, BIA's final decision should be reasonable in view of its overall analysis of the factors listed in section 151.10.

The Board further noted in that case that a trust acquisition request may be denied on the basis of an analysis of only some of the factors, if BIA's analysis shows that those factors weighed heavily against the trust acquisition. 17 IBIA at 197 n.3, 96 I.D. at 331 n. 3.

[3] In this case, the record shows that most of the factors in 25 CFR 151.10 were considered, but it does not show that the factor evidently relied upon to deny appellant's request, i.e., her lack of need for assistance in handling her affairs (subsection 151.10(d)), was considered. A document analyzing appellant's application, apparently prepared at the agency, discusses each factor listed in section 151.10, except this one. No other document in the record shows that BIA considered this factor. Nor does the decision itself explain how the conclusion that appellant did not need assistance was reached. Thus, the statement in the Area Director's decision appears as a bald conclusion rather than as one based on actual consideration of appellant's need for assistance.

Further, under its discussion of subsection 151.10(f), the analysis notes the potential conflict caused by the flowage easement and states that the portion of the property subject to the easement would be excepted from the trust acquisition. As discussed above, however, the existence of the flowage easement was given as a reason in the Area Director's decision for denying appellant's application with respect to the entire property. 6/

Given the inconsistency between the administrative record and the decision reached, the Board is unable to conclude that the record contains the necessary proof that the relevant factors were considered.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the October 27, 1987, decision of the Muskogee Area Director is vacated, and this case is remanded to him for further proceedings.

_____
Anita Vogt
Administrative Judge

I concur:

_____
Kathryn A. Lynn
Chief Administrative Judge

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6/ The Board recognizes that BIA might have concluded it was not feasible to acquire only a portion of the property. No discussion of this matter appears in the record, however.